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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LEE QUACKENBUSH, Defendant and Appellant.	D044205 (Super. Ct. No. SCD175743)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed.

Robert Lee Quackenbush entered a negotiated guilty plea to employing a minor to perform a prohibited act (Pen. Code, § 311.4, subd. (c)),[1] two counts of lewd and lascivious conduct with a minor 14 or 15 years of age (§ 288, subd. (c)(1)), engaging in sexual intercourse with a minor more than three years younger than him (§ 261.5, subd.

1 All statutory references are to the Penal Code.

(c)), and possessing material depicting a minor performing a prohibited act (§ 311.11, subd. (a)). The court sentenced him to a prison term of three years four months: the two-year middle term for employing a minor to perform a prohibited act with consecutive terms of eight months on each conviction of lewd and lascivious conduct with a minor 14 or 15 years of age (one-third the middle term). It imposed concurrent terms on the remaining convictions. Quackenbush contends that under *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*), because there was no jury determination of the factual issues the court considered in deciding whether to impose consecutive or concurrent sentences on the convictions of committing lewd and lascivious conduct with a minor 14 or 15 years of age, those sentences must be set aside.

FACTS

While Quackenbush was a sailor aboard the U.S.S. Constellation, he received nude photographs of his 15-year-old niece. The Naval Criminal Investigative Service (NCIS) conducted an investigation and learned of an ongoing sexual relationship between Quackenbush, his niece, and a classmate of his niece's. The NCIS learned Quackenbush had engaged in sexual intercourse with the classmate and had touched his niece's breasts, fondled her vaginal area, placed his penis in her mouth on one occasion and placed his mouth on her vagina on another occasion. The niece told the investigator she had sent Quackenbush nude photographs of herself at Quackenbush's request.

DISCUSSION

I. Impact of Plea Agreement

At the outset, the People argue Quackenbush is challenging the plea agreement and cannot do so without a certificate of probable cause. (See § 1237.5; *People v. Mendez* (1999) 19 Cal.4th 1084, 1095 (*Mendez*).) The People recognize that an exception to the bar on appeal after a guilty plea lies when the appeal is based on "issues regarding proceedings held subsequent to the plea for the purpose of determining the crime and the [punishment] to be imposed." (*People v. Panizzon* (1996) 13 Cal.4th 68, 74 (*Panizzon*), citing *People v. Jones* (1995) 10 Cal.4th 1102, 1106.) Relying primarily on *Mendez, supra,* 19 Cal.4th at pages 1099-1100; *Panizzon, supra*, 13 Cal.4th at page 79; *People v. Enlow* (1998) 64 Cal.App.4th 850, 853-854 (*Enlow*); and *People v. Valenzuela* (1993) 14 Cal.App.4th 837, 840-841 (*Valenzuela*), the People argue that because Quackenbush is claiming violation of a constitutional right, he is challenging the guilty plea rather than the sentence. We reject this argument.

None of the cases the People rely on bar a defendant who enters a plea agreement, absent a stipulated term, from challenging the sentence on the grounds it deprives him of his constitutional rights to a jury and proof beyond a reasonable doubt. In *Mendez,* a defendant who entered a guilty plea tried to raise the issue of his mental competence on appeal, and he claimed error in calculating credit for time served. He had not obtained a certificate of probable cause. The Supreme Court referred to the first contention as the "certificate issue" and dismissed it because it was an attempt to challenge the validity of the plea without a certificate of probable cause. It referred to the credit for time served

issue as a noncertificate issue and dismissed it because Mendez had not raised it in the trial court, the required prerequisite to seeking modification of a miscalculation of credit for time served. (*Mendez, supra,* 19 Cal.4th at pp. 1100-1104.) In *Panizzon*, the Supreme Court held that a challenge to a stipulated sentence is a challenge to the plea bargain. (*Panizzon, supra*, 13 Cal.4th at p. 79.) In *Enlow*, the reviewing court applied *Panizzon* to the challenge to a sentence stipulated in a plea bargain. (*Enlow, supra,* 64 Cal.App.4th at pp. 853-854.) Finally, in *Valenzuela*, the defendant entered an agreement to plead guilty to robbery and grand theft in exchange for "the bargained-for sentence of four years." (*Valenzuela, supra,* 14 Cal.App.4th at pp. 839-841.) The reviewing court held that failure to obtain a certificate of probable cause precluded the defendant from challenging the validity of his guilty plea to theft, claiming it was a lesser-included crime of robbery, and conviction of both crimes violated section 654. (*Valenzuela, supra,* at pp. 840-841.)

Quackenbush asserts that because there was no jury determination of the factual issues the court considered in deciding whether to impose consecutive or concurrent sentences, the trial court could not impose consecutive terms. Unlike the defendants in the cases upon which the People rely, Quackenbush is not claiming his guilty plea to the separate crimes is void. Nor is he challenging a stipulated sentence. We reject the People's waiver argument and consider the merits of Quackenbush's claim.

II. Challenge to the Sentence

In *Blakely,* the United States Supreme Court held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra*, 124 S.Ct. at p. 2536, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) The question of whether *Blakely* precludes a trial court from imposing consecutive terms is currently under review by the California Supreme Court. (See *People v. Black,* review granted July 28, 2004, S126182 and *People v. Towne*, review granted July 14, 2004, S125677.)

In California, in determining whether to impose consecutive or concurrent terms, the trial court should consider the following factors:

> "Criteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] (a). [Criteria relating to crimes] [¶] Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other. [¶] (2) The crimes involved separate acts of violence or threats of violence. [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior . . . . [¶] (b). [Other criteria and limitations] [¶] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (i) a fact used to impose the upper term, [¶] (ii) a fact used to otherwise enhance the defendant's prison sentence, and [¶] (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences . . . ." (Cal. Rules of Court, rule 4.425.)

The proper standard is proof by a preponderance of the evidence. (See *People v. Scott* (1994) 9 Cal.4th 331, 349-350.) Whether the trial court can properly impose the statutory maximum for a particular crime may depend on facts that are not resolved in the jury verdict or admitted by the defendant, the standard expressed in *Blakely*. (*Blakely, supra*, 124 S.Ct. at p. 2537; see *Apprendi, supra,* 530 U.S. at pp. 491-497 [state hate crime statute authorizing the imposition of an enhanced sentence based on a judge's

finding of certain facts by a preponderance of the evidence violated the due process clause].) As explained in *Blakely*, when the judge's authority to impose a higher sentence depends on the finding of one or more additional facts, "it remains the case that the jury's verdict [or the defendant's admission] alone does not authorize the sentence," as required to comply with constitutional principles. (*Blakely, supra*, 124 S.Ct. at pp. 2538-2539.) Thus, the question is whether this principle applies to the imposition of consecutive terms.

There is nothing in California's sentencing scheme suggesting the defendant is entitled to a concurrent rather than a consecutive sentence. As explained in *People v. Reeder* (1984) 152 Cal.App.3d 900, 923, "[w]hile there is a statutory presumption in favor of the middle term . . . there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." Absent a statutory presumption in favor of a concurrent sentence, a jury verdict finding the defendant guilty of more than one offense implicitly authorizes a consecutive sentence for each of those offenses. The lack of statutory entitlement to a particular sentence "makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra,* 124 S.Ct. at p. 2540.)

Neither *Blakely* nor *Apprendi* arose in the context of sentencing for multiple offenses. *Blakely* circumscribed the court's imposition of punishment beyond the prescribed statutory maximum for a single offense, based on an underlying concern that a state not circumvent the right to trial by jury by in effect reclassifying elements of an offense as sentencing factors or by converting a separate crime into a sentence enhancement. (*Blakely, supra,* 124 S.Ct. at pp. 2537, fn. 6, 2539- 2540 & fn. 11.) When a sentencing court selects a consecutive sentence, it is simply deciding that the defendant shall separately serve the sentence authorized by the jury verdict (or guilty plea) for the particular offense, rather than exercising leniency to allow the prescribed punishment for two separate offenses to be served at the same time. This sentencing choice does not implicate *Blakely*.

Quackenbush claims the sentence violates *Blakely*, because the judge based his decision to impose the consecutive terms on findings based on a preponderance of the evidence rather than proof beyond a reasonable doubt. However, the record does not support the claim. The court did not expressly say why it chose consecutive terms or what standard of proof it had applied. As indicated above, the court has discretion to impose consecutive terms for crimes that occur at different times or in separate places. Quackenbush entered a guilty plea to separate charges that he employed his niece and her classmate to record sexual conduct on a computer generated medium between November 2, 2002 and May 6, 2003, a period of time Quackenbush was deployed at sea with the Navy; that he orally copulated his niece on one occasion and she orally copulated him on another occasion in his San Diego apartment between September 2, and

November 2, 2002. Since Quackenbush admitted the separate crimes that occurred at different times, it is immaterial whether the court applied the preponderance of evidence of the reasonable doubt standard. The admission made *Blakely* inapplicable.

Quackenbush also argues the trial court denied him a jury trial when it failed to stay pursuant to section 654 the sentence on one of the convictions of lewd and lascivious conduct with a 14- or 15-year-old minor. *Blakely* is not implicated here. The statutory maximum, based on the jury's verdicts, is for separate punishment for each offense. Application of section 654, determination whether multiple offenses occurred on different occasions or during different courses of conduct, does not result in a sentence above the statutory maximum. Thus, under *Blakely*, a finding whether crimes occurred on the same occasion or during the same course of conduct may be made by the sentencing judge rather than a jury.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

I CONCUR:

AARON, J.

I CONCUR IN THE RESULT:

IRION, J.